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Preparatory Commission for the International Criminal Court

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Draft report of the Preparatory Commission for the International Criminal Court

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00-50803 (E) 280600

Introduction

1. The Preparatory Commission for the International Criminal Court, established in accordance with resolution F adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, met at United Nations Headquarters from 16 to 26 February, 26 July to 13 August and 29 November to 17 December 1999, and from 13 to 31 March and 12 to 30 June 2000, in accordance with General Assembly resolutions 53/105 of 8 December 1998 and 54/105 of 9 December 1999.

2. In accordance with paragraph 2 of resolution F of the Conference, the Preparatory Commission consists of representatives of States which signed the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court and other States which were invited to participate in the Conference.

3. Under paragraph 4 of General Assembly resolution 53/105 and paragraph 3 of resolution 54/105, the Secretary-General was requested to convene the Preparatory Commission, in accordance with resolution F of the Conference, from 16 to 26 February, 26 July to 13 August and 29 November to 17 December 1999, and from 13 to 31 March, 12 to 30 June and 27 November to 8 December 2000, to carry out the mandate of those resolutions and, in that connection, to discuss ways to enhance the effectiveness and acceptance of the Court.

4. In accordance with paragraph 6 of General Assembly resolution 53/105 and paragraph 5 of resolution 54/105, the Secretary-General invited, as observers to the Preparatory Commission, representatives of organizations and other entities that have received a standing invitation from the General Assembly, pursuant to its relevant resolutions, to participate in the capacity of observers in its sessions and work, and also invited as observers to the Preparatory Commission representatives of interested regional intergovernmental organizations and other interested international bodies, including the international tribunals for the former Yugoslavia and for Rwanda.

5. Under paragraph 7 of General Assembly resolution 53/105 and paragraph 6 of resolution 54/105, non-governmental organizations may participate in the work of the Preparatory Commission by attending its plenary and its other open meetings, in accordance with the rules of procedure of the Commission, receiving copies of the official documents and making available their materials to delegates.

6. The session was opened by the Secretary-General of the United Nations, Mr. Kofi Annan, and by the Under-Secretary-General, the Legal Counsel, Mr. Hans Corell, both of whom made statements.

7. At its 1st and 2nd meetings, on 16 and 22 February 1999, the Preparatory Commission elected its Bureau, as follows:

Chairperson:

Mr. Philippe Kirsch (Canada)

Vice-Chairpersons:

Mr. George Winston McKenzie (Trinidad and Tobago)

Mr. Medard R. Rwelamira (South Africa)

Mr. Muhamed Sacirbey (Bosnia and Herzegovina)

Rapporteur:

Mr. Salah Suheimat (Jordan)

8. Mr. Václav Mikulka, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary of the Preparatory Commission. Mr. Manuel Rama-Montaldo, Deputy Director of the Codification Division, acted as Deputy Secretary of the Commission and Secretary of the Working Groups on Rules of Procedure and Evidence. Ms. Mahnoush H. Arsanjani, Senior Legal Officer, acted as Secretary of the Working Group on Elements of Crimes. The following members of the Codification Division also provided substantive servicing to the Commission: Ms. Christiane Bourloyannis-Vrailas, Mr. George Korontzis, Ms. Virginia Morris, Mr. Trevor Chimimba, Mr. Renan Villacis, Ms. Ruth Khalastchi and Mr. Arnold Pronto.

9. At its 1st meeting, on 16 February 1999, the Preparatory Commission adopted the following agenda (PCNICC/1999/L.1):

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.

4. Organization of work.

5. Implementation of resolution F of the Final Act of the United Nations Diplomatic Conference of Plenipoteniaries on the Establishment of an International Criminal Court, adopted on 17 July 1998, and paragraph 4 of General Assembly resolution 53/105 of 8 December 1998.

6. Adoption of the report.

10. Also at its 1st meeting, the Preparatory Commission agreed that its rules of procedure were the rules of procedure of the General Assembly as applied to the Main Committees together with paragraphs 6 and 7 of General Assembly resolution 53/105.

11. Taking account of the priorities set forth by resolution F of the Conference, the Preparatory Commission's work plan for its first to fifth sessions focused on two essential instruments necessary for the functioning of the Court and for which the Commission had to prepare finalized draft texts before 30 June 2000 in accordance with that resolution: the Rules of Procedure and Evidence, and the Elements of Crimes.

12. In order to facilitate the tasks of the Preparatory Commission with regard to the Rules and Procedure and Evidence and the Elements of Crimes, the Chairman, in consultation with the Bureau, designated the following coordinators:

- Mr. Herman von Hebel (Netherlands) for the Elements of Crimes;
- Ms. Silvia Fernandez de Gurmendi (Argentina) for the Rules of Procedure and Evidence;
- Mr. Medard R. Rwelamira (South Africa) for the Rules of Procedure and Evidence relating to Part 4 (Composition and Administration of the Court) of the Statute;
- Mr. Rolf Fife (Norway) for the Rules of Procedure and Evidence relating to Part 7 (Penalties) of the Statute;
- Mr. Phakiso Mochochoko (Lesotho) for the Rules of Procedure and Evidence relating to Part 9 (International Cooperation and Judicial Assistance) and Part 10 (Enforcement) of the Statute.

13. During its first, second, third and fourth sessions, the Preparatory Commission took note of the oral reports of the coordinators for the Rules of Procedure and Evidence and for the Elements of Crimes at its 3rd meeting, on 26 February 1999, its 8th meeting, on 13 August 1999, its 12th meeting, on 17 December 1999, and its 16th meeting, on 31 March 2000.

14. At its fifth session at the 23rd meeting, on 30 June 2000, the coordinators introduced the reports of the Working Group on Rules of Procedure and Evidence and the Working Group on Elements of Crimes (PCNICC/2000/WGRPE/... and PCNICC/2000/WGEC/L.1 and Add.1 and Add.2).

15. At the same meeting, the Preparatory Commission adopted its report containing the finalized draft texts of the Rules of Procedure and Evidence and the Elements of Crimes in accordance with paragraphs 5 and 6 of resolution F of the Conference. The Preparatory Commission also requested the Secretariat to prepare a consolidated version of the texts.

16. In order to ensure linguistic consistency among the various language versions, the Preparatory Commission at its fifth session, at the 22nd meeting, on 28 June 2000, agreed to allow delegations to submit only linguistic corrections to the Secretariat no later than 15 October 2000 to be incorporated in the report.

17. The Preparatory Commission was addressed by Judge Gabrielle Kirk McDonald, President of the International Tribunal for the Former Yugoslavia, at its 5th meeting, on 30 July 1999; by Judge Richard George May of the International Tribunal for the Former Yugoslavia, at its 14th meeting, on 20 March 2000; by Mr. Olara Otunnu, Special Representative of the Secretary-General for Children and Armed Conflict, at its 16th meeting, on 31 March 2000; by Judge Navanethem Pillay and Judge Erik Møse, the President and Vice-President of the International Criminal Tribunal for Rwanda, respectively, at its 17th meeting, on 12 June 2000; and by Judge Claude Jorda, President of the International Tribunal for the Former Yugoslavia, at its 19th meeting, on 19 June 2000.

18. The Preparatory Commission took note of the Intergovernmental Regional Caribbean Conference for the signature and ratification of the Rome Statute of the International Criminal Court hosted by the Ministry of the Attorney General of Trinidad and Tobago and the No Peace Without Justice Foundation, in Port-of-Spain from 15 to 17 March 1999, as well as the Port-of-Spain Declaration resulting therefrom; the international seminar on victims' access to the International Criminal Court hosted by the Government of France in

Paris from 27 to 29 April 1999; the informal inter-sessional meeting hosted by the International Institute of Higher Studies in Criminal Sciences in Siracusa, Italy, from 21 to 27 June 1999; the two briefing sessions on ratification and implementation legislation of the Rome Statute, hosted by the International Human Rights Law Institute of DePaul University and Parliamentarians for Global Action at United Nations Headquarters in New York on 31 July and 7 August 1999; the informal inter-sessional meeting hosted by the Government of Italy and the International Institute of Higher Studies in Criminal Sciences in Siracusa, Italy, from 31 January to 6 February 2000; and the inter-sessional meeting of the coordinators and sub-coordinators dealing with the Rules of Procedure and Evidence hosted by the Government of Canada in Mont-Tremblant from 30 April to 5 May 2000.

19. The Preparatory Commission also noted with satisfaction that, during its first to fifth sessions, a total of 72 delegates had made use of the trust fund which, pursuant to paragraph 8 of General Assembly resolution 53/105, had been established to facilitate the participation of the least developed countries in the work of the Commission. The Preparatory Commission expressed its appreciation to the Holy See, Norway and the United Kingdom of Great Britain and Northern Ireland for their contributions to the trust fund, as well as to the International Human Rights Law Institute of DePaul University, which had provided accommodation for some of the delegates from the least developed countries.

20. The list of documents relating to the Rules of Procedure and Evidence and the Elements of Crimes issued at the first to fifth sessions of the Preparatory Commission, held in 1999 and 2000, is contained in the annex to the present report.

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Part I. Finalized draft text of the Rules of Procedure and Evidence

Rules of Procedure and Evidence

The finalized draft text of the Rules of Procedure and Evidence is contained in the following documents:

PCNICC/2000/WGRPE/L.1
PCNICC/2000/WGRPE/L.1/Corr.1
PCNICC/2000/WGRPE/L.1/Add.1
PCNICC/2000/WGRPE/L.1/Add.2
PCNICC/2000/WGRPE/L.1/Add.3
PCNICC/2000/WGRPE/L.1/Add.3/Rev.1
PCNICC/2000/WGRPE/L.2
PCNICC/2000/WGRPE/L.2/Corr.1
PCNICC/2000/WGRPE/L.2/Corr.2
PCNICC/2000/WGRPE/L.2/Corr.3 (French only)
PCNICC/2000/WGRPE/L.2/Add.1*
PCNICC/2000/WGRPE/L.3
PCNICC/2000/WGRPE/L.3/Corr.1
PCNICC/2000/WGRPE/L.4
PCNICC/2000/WGRPE/L.5
PCNICC/2000/WGRPE/L.5/Corr.1
PCNICC/2000/WGRPE/L.5/Corr.2 (French only)
PCNICC/2000/WGRPE/L.6
PCNICC/2000/WGRPE/L.7
PCNICC/2000/WGRPE/L.7/Corr.1

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PCNICC/2000/WGRPE/L.8

PCNICC/2000/WGRPE/L.8/Corr.1

PCNICC/2000/WGRPE/L.9

PCNICC/2000/WGRPE/L.9/Corr.1

PCNICC/2000/WGRPE/L.9/Corr.2 (Spanish only)

PCNICC/2000/WGRPE/L.10

PCNICC/2000/WGRPE/L.11

PCNICC/2000/WGRPE/L.12

PCNICC/2000/WGRPE/L.12/Corr.1

PCNICC/2000/WGRPE/L.12/Add.1

PCNICC/2000/WGRPE/L.12/Add.1/Corr.1

PCNICC/2000/WGRPE/L.13

PCNICC/2000/WGRPE/L.14

PCNICC/2000/WGRPE/L.14/Corr.1

PCNICC/2000/WGRPE/L.14/Add.1

PCNICC/2000/WGRPE/L.14/Add.2

PCNICC/2000/WGRPE/L.15

PCNICC/2000/WGRPE/L.15/Corr.1

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Part II. Finalized draft text of the Elements of Crimes

Elements of Crimes

Addendum

The finalized draft text of the Elements of Crime is contained in documents PCNICC/2000/WGEC/L.1, PCNICC/2000/WGEC/L.1/Corr.1, PCNICC/2000/WGEC/L.1/Add.1, PCNICC/2000/WGEC/L.1/Add.2 and PCNICC/2000/WGEC/L.1/Add.2/Corr.1.

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Proceedings of the Preparatory Commission at its fifth session (12-30 June 2000)

Draft summary

Rapporteur: Mr. Salah **Suheimat** (Jordan)

1. The Preparatory Commission for the International Criminal Court, established in accordance with resolution F adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, met at United Nations Headquarters from 12 to 30 June 2000, in accordance with General Assembly resolution 54/105 of 9 December 1999.

2. In accordance with paragraph 2 of resolution F of the Conference, the Preparatory Commission consists of representatives of States which signed the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court and other States which were invited to participate in the Conference.

3. Under paragraph 3 of General Assembly resolution 54/105, the Secretary-General was requested to convene the Preparatory Commission, in accordance with resolution F of the Conference, from 13 to 31 March, 12 to 30 June and 27 November to 8 December 2000, to carry out the mandate of that resolution and, in that connection, to discuss ways to enhance the effectiveness and acceptance of the Court.

4. In accordance with paragraph 5 of resolution 54/105, the Secretary-General invited, as observers to the Preparatory Commission, representatives of organizations and other entities that have received a standing invitation from the General Assembly, pursuant to its relevant resolutions, to participate in the capacity of observers in its sessions and work, and also invited as observers to the Preparatory Commission representatives of interested regional intergovernmental organizations and other interested international bodies, including the international tribunals for the former Yugoslavia and for Rwanda.

5. Under paragraph 6 of the same resolution, non-governmental organizations may participate in the work of the Preparatory Commission by attending its plenary and its other open meetings, in accordance with the rules of procedure of the Commission, receiving copies of the official documents and making available their materials to delegates.

6. The Bureau of the Preparatory Commission, elected at its 1st and 2nd meetings, on 16 and 22 February 1999, continued its work with the following composition:

00-50809 (E) 280600

Chairperson:
Mr. Philippe Kirsch (Canada)

Vice-Chairpersons:
Mr. George Winston McKenzie (Trinidad and Tobago)
Mr. Medard R. Rwelamira (South Africa)
Mr. Muhamed Sacirbey (Bosnia and Herzegovina)

Rapporteur:
Mr. Salah Suheimat (Jordan)

7. The Director of the Codification Division of the Office of Legal Affairs, Mr. Václav Mikulka, acted as Secretary of the Preparatory Commission. The Codification Division provided the substantive servicing for the Commission.

8. At its fifth session, the Preparatory Commission proceeded with its work on the basis of its agenda (PCNICC/1999/L.1), adopted on 16 February 1999.

9. Taking account of the priorities set forth by resolution F of the Conference, the Preparatory Commission agreed on a work plan for the June session, focusing on two essential instruments necessary for the functioning of the Court: the Rules of Procedure and Evidence, and the Elements of Crimes. The Commission also held a number of meetings and consultations with respect to the crime of aggression.

10. The coordinators, designated by the Chairperson, in consultation with the Bureau, at the first session of the Preparatory Commission,[1] continued their work also during the fifth session of the Preparatory Commission.

11. At its 23rd meeting, on 30 June 2000, the Preparatory Commission adopted its report containing the finalized draft texts of the Rules of Procedure and Evidence and the Elements of Crimes (see PCNICC/2000/1 and Add.1 and 2).

12. At the same meeting, the Preparatory Commission took note of the oral report of the coordinator for the crime of aggression.

13. At its 22nd meeting, on 28 June 2000, the Preparatory Commission decided, in accordance with its mandate under resolution F of the Rome Conference, to consider, at its sixth session, to be held from 27 November to 8 December 2000, in addition to the crime of aggression, the following three items: the Relationship Agreement between the Court and the United Nations; the Financial Regulations and Rules of the Court; and the Agreement on Privileges and Immunities of the Court. At the same meeting, the Preparatory Commission also decided to establish working groups on each of the three new items. The Chairman informed the Commission that the coordinators for the three new items and the contact points for the remaining items within its mandate under resolution F would be announced at the next session.[2] In order to facilitate its work, the Preparatory Commission requested the Secretariat to prepare purely technical drafts, including only standard provisions, for the three instruments and to distribute them in advance to enable delegations to study them carefully.

14. The Preparatory Commission was addressed by Judge Navanethem Pillay and Judge Erik Møse, the President and Vice-President of the International Criminal Tribunal for Rwanda, respectively, at its 17th meeting, on 12 June 2000; and Judge Claude Jorda, President of the International Tribunal for the Former Yugoslavia, at its 19th meeting, on 19 June 2000.

15. The Preparatory Commission took note of the inter-sessional meeting of the coordinators and sub-coordinators dealing with the Rules of Procedure and Evidence hosted by the Government of Canada in Mont-Tremblant from 30 April to 5 May 2000.

16. The Preparatory Commission also noted with satisfaction that, during its fifth session, a total of 11 delegates had made use of the trust fund which, pursuant to paragraph 8 of General Assembly resolution 53/105 of 8 December 1998, had been established to facilitate the participation of the least developed countries in the work of the Commission. The Preparatory Commission also expressed its appreciation for the recent contribution to the trust fund by Norway.

17. The list of documents relating to the Rules of Procedure and Evidence and the Elements of Crimes

[1] For the list of coordinators, see PCNICC/1999/L.5/Rev.1, paras. 11-12.

[2] The remaining items are the following: the basic principles governing a Headquarters Agreement to be negotiated between the Court and the host country; a budget for the first financial year; the rules of procedure of the Assembly of States Parties; and, in connection with carrying out the mandate of resolution F, discussion of ways to enhance the effectiveness and acceptance of the Court.

issued at the first to fifth sessions of the Preparatory Commission, held in 1999 and 2000, is contained in the report of the Preparatory Commission (PCNICC/2000/1, annex I). The list of documents relating to the crime of aggression and other matters issued at those sessions is contained in annex I to the present document.

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Proceedings of the Preparatory Commission at its fifth session (12-30 June 2000)

Draft Summary

Rapporteur: Mr. Salah **Suheimat** (Jordan)

Addendum

12 *bis*. At the same meeting, the Preparatory Commission also took note of the following:

The proceedings of the Preparatory Commission for the International Criminal Court at its fourth session (PCNICC/2000/L.1/Rev.1/Add.1) contained the following footnote (footnote 85): "The issue of pre-trial regulations concerning the detention in custody in a prison facility made available by the host State, together with those concerning the detention of sentenced persons who remain in a prison facility made available by the host State, should be envisaged in the host arrangement. This arrangement should provide for arrangements concerning the exercise of the right of a detainee to file a complaint to a judge of the Court about the detention conditions." This footnote was deleted on the understanding that the issues raised therein are to be dealt with in the context of the host country agreement.

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Proceedings of the Preparatory Commission at its fifth session (12-30 June 2000)

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00-51989 (E) 130700

Summary

Rapporteur: Mr. Salah **Suheimat** (Jordan)

1. The Preparatory Commission for the International Criminal Court, established in accordance with resolution F adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, met at United Nations Headquarters from 12 to 30 June 2000, in accordance with General Assembly resolution 54/105 of 9 December 1999.

2. In accordance with paragraph 2 of resolution F of the Conference, the Preparatory Commission consists of representatives of States which signed the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court and other States which were invited to participate in the Conference.

3. Under paragraph 3 of General Assembly resolution 54/105, the Secretary-General was requested to convene the Preparatory Commission, in accordance with resolution F of the Conference, from 13 to 31 March, 12 to 30 June and 27 November to 8 December 2000, to carry out the mandate of that resolution and, in that connection, to discuss ways to enhance the effectiveness and acceptance of the Court.

4. In accordance with paragraph 5 of resolution 54/105, the Secretary-General invited, as observers to the Preparatory Commission, representatives of organizations and other entities that have received a standing invitation from the General Assembly, pursuant to its relevant resolutions, to participate in the capacity of observers in its sessions and work, and also invited as observers to the Preparatory Commission representatives of interested regional intergovernmental organizations and other interested international bodies, including the international tribunals for the former Yugoslavia and for Rwanda.

5. Under paragraph 6 of the same resolution, non-governmental organizations may participate in the work of the Preparatory Commission by attending its plenary and its other open meetings, in accordance with the rules of procedure of the Commission, receiving copies of the official documents and making available their materials to delegates.

6. The Bureau of the Preparatory Commission, elected at its 1st and 2nd meetings, on 16 and 22 February 1999, continued its work with the following composition:

Chairperson:
Mr. Philippe Kirsch (Canada)

Vice-Chairpersons:
Mr. George Winston McKenzie (Trinidad and Tobago)
Mr. Medard R. Rwelamira (South Africa)
Mr. Muhamed Sacirbey (Bosnia and Herzegovina)

Rapporteur:
Mr. Salah Suheimat (Jordan)

7. The Director of the Codification Division of the Office of Legal Affairs, Mr. Václav Mikulka, acted as Secretary of the Preparatory Commission. The Codification Division provided the substantive servicing for the Commission.

8. At its fifth session, the Preparatory Commission proceeded with its work on the basis of its agenda (PCNICC/1999/L.1), adopted on 16 February 1999.

9. Taking account of the priorities set forth by resolution F of the Conference, the Preparatory Commission agreed on a work plan for the June session, focusing on two essential instruments necessary for the functioning of the Court: the Rules of Procedure and Evidence, and the Elements of Crimes. The Commission also held a number of meetings and consultations with respect to the crime of aggression.

10. The coordinators, designated by the Chairperson, in consultation with the Bureau, at the first session of the Preparatory Commission,[1] continued their work also during the fifth session of the Preparatory Commission.

11. At its 23rd meeting, on 30 June 2000, the Preparatory Commission adopted its report containing the finalized draft texts of the Rules of Procedure and Evidence and the Elements of Crimes (see PCNICC/2000/1 and Add.1 and 2).

12. At the same meeting, the Preparatory Commission took note of the oral report of the coordinator for the crime of aggression.

13. At the same meeting, the Preparatory Commission also took note of the following with respect to the Working Group on the Rules of Procedure and Evidence:

- The proceedings of the Preparatory Commission for the International Criminal Court at its fourth session (PCNICC/2000/L.1/Rev.1/Add.1) contained the following footnote (footnote 85): "The issue of pre-trial regulations concerning the detention in custody in a prison facility made available by the host State, together with those concerning the detention of sentenced persons who remain in a prison facility made available by the host State, should be envisaged in the host arrangement. This arrangement should provide for arrangements concerning the exercise of the right of a detainee to file a complaint to a judge of the Court about the detention conditions." The footnote was deleted on the understanding that the issues raised therein are to be dealt with in the context of the host country agreement.

- The Working Group recommended that document PCNICC/2000/WGRPE(13)/DP.1 be referred to the Preparatory Commission for consideration in the context of the rules of procedure of the Assembly of States Parties.

- The Working Group recommended for the further consideration of the Preparatory Commission, in connection with the discussions on a Relationship Agreement between the Court and the United Nations, a proposal as follows:

  In addition to the requirement provided in article 121, paragraph 7, the Secretary-General of the United Nations shall circulate to all States Members of the United Nations or members of specialized agencies or of the International Atomic Energy Agency, which are not parties to the Statute, the text of any amendment adopted pursuant to article 121, and the text of communications to the Secretary-General relating to the acceptance of such an amendment.

- It was generally understood that rule 9.19 should not be interpreted as requiring or in any way calling for the negotiation of provisions in any particular international agreement by the Court or by any other international organization or State.

14. At its 22nd meeting, on 28 June 2000, the Preparatory Commission decided, in accordance with its mandate under resolution F of the Rome Conference, to consider, at its sixth session, to be held from 27 November to 8 December 2000, in addition to the crime of aggression, the following three items: the Relationship Agreement between the Court and the United Nations; the Financial Regulations and Rules of the Court; and the Agreement on Privileges and Immunities of the Court. At the same meeting, the Preparatory Commission also decided to establish working groups on each of the three new items. The Chairman informed the Commission that the coordinators for the three new items and the contact points for the remaining items within its mandate under resolution F would be announced at the next session.[2] In order to facilitate its work, the Preparatory Commission requested the Secretariat to prepare purely technical drafts, including only standard provisions, for the three instruments and to distribute them in advance to enable delegations to study them carefully.

15. The Preparatory Commission was addressed by Judge Navanethem Pillay and Judge Erik Møse, the President and Vice-President of the International Criminal Tribunal for Rwanda, respectively, at its 17th meeting, on 12 June 2000; and by Judge Claude Jorda, President of the International Tribunal for the Former Yugoslavia, at its 19th meeting, on 19 June 2000.

16. The Preparatory Commission took note of the inter-sessional meeting of the coordinators and sub-coordinators dealing with the Rules of Procedure and Evidence hosted by the Government of Canada in Mont-Tremblant from 30 April to 5 May 2000.

17. The Preparatory Commission also noted with satisfaction that, during its fifth session, a total of 12 delegates had made use of the trust fund which, pursuant to paragraph 8 of General Assembly resolution 53/105 of 8 December 1998, had been established to facilitate the participation of the least developed countries in the work of the Commission. The Preparatory Commission also expressed its appreciation for the recent contribution to the trust fund by Norway.

18. The list of documents relating to the Rules of Procedure and Evidence and the Elements of Crimes issued at the first to fifth sessions of the Preparatory Commission, held in 1999 and 2000, is contained in the report of the Preparatory Commission

(PCNICC/2000/1, annex I). The list of documents relating to the crime of aggression and other matters issued at those sessions is contained in annex I to the present document.

Notes

[1] For the list of coordinators, see PCNICC/1999/L.5/Rev.1, paras. 11-12.

[2] The remaining items include the following: the basic principles governing a Headquarters Agreement to be negotiated between the Court and the host country; a budget for the first financial year; the rules of procedure of the Assembly of States Parties; and, in connection with carrying out the mandate of resolution F, discussion of ways to enhance the effectiveness and acceptance of the Court.

Annex I

List of documents relating to the crime of aggression and other matters issued at the first, second, third, fourth and fifth sessions of the Preparatory Commission, held in 1999 and 2000*

[Original: English/French/Spanish]

General documents

First session of the Preparatory Commission (16-26 February 1999)

Symbol	*Description*
PCNICC/1999/L.1	Provisional agenda
PCNICC/1999/L.3	Proceedings of the Preparatory Commission at its first session (draft summary)
PCNICC/1999/L.3/Rev.1	Proceedings of the Preparatory Commission at its first session (summary)
PCNICC/1999/INF/1	Provisional membership of the Preparatory Commission (first session)
PCNICC/1999/DP.11	Proposal submitted by Bahrain, Iraq, Lebanon, the Libyan Arab Jamahiriya, Oman, the Sudan, the Syrian Arab Republic and Yemen on the crime of aggression

Second session of the Preparatory Commission (26 July-13 August 1999)

Symbol	*Description*
PCNICC/1999/L.4	Proceedings of the Preparatory Commission at its second session (draft summary)
PCNICC/1999/L.4/Rev.1	Proceedings of the Preparatory Commission at its second session (summary)
PCNICC/1999/L.4/Rev.1/Corr.1	Corrigendum
PCNICC/1999/DP.12	Proposal submitted by the Russian Federation: Definition of the crime of aggression
PCNICC/1999/DP.13	Proposal submitted by Germany: Definition of the crime of aggression
PCNICC/1999/INF/1/Rev.1	List of delegations: first and second sessions of the Preparatory Commission
PCNICC/1999/INF/2	Compilation of proposals on the crime of aggression submitted at the Preparatory Committee on the Establishment of an International Criminal Court (1996-1998), the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (1998) and the Preparatory Commission for the International Criminal Court (1999)
PCNICC/1999/INF/2/Add.1	Addendum

* See document PCNICC/2000/INF/3, annex I (to be subsequently included in document PCNICC/2000/1), for the list of documents relating to the Rules of Procedure and Evidence and the Elements of Crimes issued at the first to fifth sessions of the Preparatory Commission, held in 1999 and 2000.

Third session of the Preparatory Commission (29 November-17 December 1999)

Symbol	*Description*
PCNICC/1999/L.5	Proceedings of the Preparatory Commission at its first, second and third sessions (16-26 February, 26 July-13 August and 29 November-17 December 1999) (draft summary)
PCNICC/1999/L.5/Rev.1 and Add.1 and 2	Proceedings of the Preparatory Commission at its first, second and third sessions (16-26 February, 26 July-13 August and 29 November-17 December 1999) (summary)
PCNICC/1999/INF/1/Rev.1/Add.1 and 2	List of delegations
PCNICC/1999/INF/3	Rome Statute of the International Criminal Court, adopted at Rome on 17 July 1998. Note by the Secretariat

Fourth session of the Preparatory Commission (13-31 March 2000)

Symbol	*Description*
PCNICC/2000/L.1	Proceedings of the Preparatory Commission at its fourth session (13-31 March 2000) (draft summary)
PCNICC/2000/L.1/Rev.1 and Add.1 and 2	Proceedings of the Preparatory Commission at its fourth session (13-31 March 2000) (summary)
PCNICC/2000/INF/1	List of delegations

Fifth session of the Preparatory Commission (12-30 June 2000)

Symbol	*Description*
PCNICC/2000/L.3	Proceedings of the Preparatory Commission at its fifth session (draft summary)
PCNICC/2000/L.3/Add.1	Addendum (continued)
PCNICC/2000/L.3/Rev.1	Proceedings of the Preparatory Commission at its fifth session (summary)
PCNICC/2000/INF/2	List of delegations

Working Group on the Crime of Aggression*

Third session of the Preparatory Commission (29 November-17 December 1999)

Symbol	*Description*
PCNICC/1999/WGCA/DP.1	Proposal submitted by Greece and Portugal
PCNICC/1999/WGCA/RT.1	Discussion paper proposed by the Coordinator: Consolidated text of proposals on the crime of aggression
PCNICC/1999/WGCA/RT.1/Corr.1	Corrigendum
PCNICC/1999/WGCA/RT.1/Corr.2	Corrigendum (French only)

* No documents were issued under this heading during the first and second sessions of the Preparatory Commission.

Fourth session of the Preparatory Commission (13-31 March 2000)

Symbol	*Description*
PCNICC/2000/WGCA/DP.1	Proposal submitted by Colombia on the definition of the crime of aggression and on conditions for the exercise of the jurisdiction of the Court with regard to this crime
PCNICC/2000/WGCA/DP.1/Add.1	Addendum
PCNICC/2000/WGCA/DP.2	Proposal submitted by Colombia on the Italian proposal made orally in the Working Group on 13 March 2000
PCNICC/2000/WGCA/DP.3	Suggestions made orally by Italy on 13 March 2000 with regard to a structure for discussion on the crime of aggression
PCNICC/2000/WGCA/RT.1	Discussion paper proposed by the Coordinator: Preliminary list of possible issues relating to the crime of aggression

Fifth session of the Preparatory Commission (12-30 June 2000)

Symbol	*Description*
PCNICC/2000/WGCA/INF/1	Reference document on the crime of aggression, prepared by the Secretariat

Annex II

Crime of aggression

[Original: English]

(Prepared on the basis of the discussion papers proposed by the Coordinator)[1]

Consolidated text of proposals on the crime of aggression

Definition of the crime of aggression

Option 1

1. For the purposes of the present Statute, [and subject to a determination by the Security Council regarding the act of a State,] the crime of aggression means [the use of the armed force, including the initiation thereof, by an individual who is in a position of exercising control or directing the political or military action of a State, against the sovereignty, territorial integrity or political independence of a State in violation of the Charter of the United Nations.] any of the following acts committed by [an individual] [a person] who is in a position of exercising control or capable of directing the political or military action of a State:

(a) initiating, or

(b) carrying out

Variation 1

[an armed attack] [the use of armed force] [a war of aggression] [a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing] against another State [against another State, or depriving other peoples of their rights to self-determination], in [manifest] contravention of the Charter of the United Nations, to violate [to threaten or to violate] the [sovereignty,] territorial integrity or political independence of that State [or the inalienable rights of those people] [except when this is required by the principle of equal rights and self-determination of peoples and the rights of individual or collective self-defence]

Variation 2

an armed attack directed by a State against the territorial integrity or political independence of another State when this armed attack was undertaken in manifest contravention of the Charter of the United Nations with the object or result of establishing a military occupation of, or annexing, the territory of such other State or part thereof by armed forces of the attacking State.

[1] The consolidated text of proposals on the crime of aggression was issued at the third session of the Preparatory Commission and the preliminary list of possible issues relating to the crime of aggression was issued at the fourth session.

Variation 3

Add the following paragraph to paragraph 1, variation 1, above:

2. Provided that the acts concerned or their consequences are of sufficient gravity, [acts constituting aggression include] [the use of the armed force includes] [are] the following [whether preceded by a declaration of war or not]:

(a) The invasion or attack by the armed forces of a State of a territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade [of the ports or coasts] of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed before, or its substantial involvement therein.

3. When an attack [the use of armed force] under paragraph 1 has been committed, the

(a) planning

(b) preparing, or

(c) ordering

thereof by an individual who is in a position of exercising control or capable of directing the political or military action of a State shall also constitute a crime of aggression.

Option 2

For the purposes of the present Statute and subject to a prior determination by the United Nations Security Council of an act of aggression by the State concerned, the crime of aggression means any of the following acts: planning, preparing, initiating or carrying out a war of aggression.

Conditions for the exercise of jurisdiction

Option 1

1. The Court shall exercise its jurisdiction with regard to the crime of aggression in accordance with the provisions of article 13 of the Statute.

2. The Security Council shall determine the existence of an act of aggression perpetrated by the State whose national is concerned in accordance with the relevant provisions of the Charter of the United Nations before proceedings take place in the Court with regard to the crime of aggression.

3. The Security Council, acting in accordance with article 13 (b) of the Statute of the International Criminal Court, shall first make a decision establishing that an act of aggression has been committed by the State whose national is concerned.

4. The Court, upon receipt of a complaint relating to the crime of aggression under article 13 (a) or (c), shall, with due regard to the provisions of Chapter VII of the Charter of the United Nations, first request the Security Council to determine whether or not an act of aggression has been committed by the State whose national is concerned.

5. The Security Council shall make a decision upon this request within [6] [12] months.

6. Notification of this decision shall be made by letter from the President of the Security Council to the President of the International Criminal Court without delay.

Variation 1

7. In the absence of a decision of the Security Council within the time-frame referred to in paragraph 5 above, the Court may proceed.

8. The decision of the Security Council under paragraph 5 above shall not be interpreted as in any way affecting the independence of the Court in the exercise of its jurisdiction with regard to the crime of aggression.

Variation 2

7. Notwithstanding the provisions of paragraph 2 above, in the absence of a decision by the Security Council within the time-frame referred to in paragraph 5 above, the Court shall, with due regard to the provisions of articles 12, 14 and 24 of the Charter, request the General Assembly of the United Nations to make a recommendation.

8. The General Assembly shall make such a recommendation within [12] months.

9. Notification of this recommendation shall be made by letter from the President of the General Assembly to the President of the International Criminal Court without delay.

10. In the absence of such a recommendation within the time-frame referred to in paragraph 8 above, the Court may proceed.

11. The decision of the Security Council under paragraph 5 above or the recommendation of the General Assembly under paragraph 8 above shall not be

interpreted as in any way affecting the independence of the Court in the exercise of its jurisdiction with regard to the crime of aggression.

Option 2

1. The Court shall exercise its jurisdiction with regard to the crime of aggression subject to a determination by the Security Council in accordance with article 39 of the Charter, that an act of aggression has been committed by the State concerned.

2. When a complaint related to the crime of aggression has been lodged, the Court shall first seek to discover whether a determination has been made by the Security Council with regard to the alleged aggression by the State concerned and, if not, it will request, subject to the provisions of the Statute, the Security Council to proceed to such a determination.

3. If the Security Council does not make such a determination or does not make use of article 16 of the Statute within 12 months of the request, the Court shall proceed with the case in question.

Option 3[2]

For the purposes of the present Statute and subject to a prior determination by the United Nations Security Council of an act of aggression by the State concerned, the crime of aggression means any of the following acts: planning, preparing, initiating or carrying out a war of aggression.

Explanatory note

A. On the definition of the crime of aggression

(i) The previous text represents an attempt to consolidate, to the extent possible, the proposals already made on the question of definition of the crime of aggression for the purpose of the Rome Statute.

(ii) The text accepts two basic principles, which seem to enjoy widespread support: the principle under which the crime of aggression is committed by political or military leaders of a State; and the principle that the planning, preparation or ordering of aggression should be criminalized only when an act of aggression takes place.

(iii) Option 1 presents three variations after the first sentence in paragraph 1. These variations correspond to most of the various approaches that were suggested with regard to definition: general definition, definition based on the object or result of occupying or annexing the territory of the attacked State or part thereof, general definition plus detailed list of acts taken from General Assembly resolution 3314 (XXIX) of 14 December 1974.

(iv) Option 2 covers both the definition and the relationship with the Security Council, and is based, in its definitional part, on article 6 (a) of the Charter of the International Military Tribunal of Nuremberg.

[2] Option 3 is duplicated and appears also under the definition of the crime of aggression since it covers the two issues, namely, the definition of the crime and conditions for the exercise of jurisdiction.

(v) On some points, square brackets appeared to be inevitable to show the different formulas that were suggested. Where part of the text is added in square brackets, this is not intended to indicate lesser support for that part.

B. On the conditions for the exercise of jurisdiction

(i) The text is an attempt to consolidate all the proposals circulated so far on this issue, taking also into account views expressed by delegations from the floor.

(ii) Option 1 is an attempt to reflect views seeking to reconcile the prerogatives of the Security Council with the independence of the Court.

Hence, it is founded on the following considerations:

- Article 5 (2) of the Statute of the International Criminal Court stipulates that the definition of the *crime of aggression* and the conditions under which the Court shall exercise jurisdiction with respect to this crime shall be consistent with the relevant provisions of the Charter of the United Nations;
- As set out in article 39 of the Charter, the Security Council has the responsibility for establishing the existence of an *act of aggression*;
- The Court exercises its jurisdiction over persons on the *crime of aggression* (articles 1, 5 and 25 of the Statute);
- The *crime of aggression* presupposes the existence of an *act of aggression*;
- The trigger mechanism should therefore recognize the primary responsibility of the Security Council to establish the existence of an *act of aggression* in accordance with the relevant provisions of the Charter;
- Variation 2 is based on the assumption that if, for any reason, the Security Council cannot make a decision, the Charter itself provides for an internal mechanism to address the issue.

(iii) Option 3 embodies both the definition and the relationship between the Court and the Security Council, and is based in its conditional part on the proposal as contained in article 23 (2) of the International Law Commission draft statute for the International Criminal Court.

Preliminary list of possible issues relating to the crime of aggression

Discussion paper proposed by the Coordinator

A possible checklist of issues to be addressed in developing proposals for a provision on aggression in accordance with article 5, paragraph 2, of the Rome Statute and resolution F, paragraph 7, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

N.B. This preliminary list of possible issues is based on an initial review of the Rome Statute with a view to determining the provisions that may in some way be related to the definition of the crime of aggression. This non-exhaustive list is intended to facilitate a thematic discussion of possible issues most of which are closely interrelated.

I. Possible issues relating to the Rome Statute

- **Definition**

  (i) Whether the definition should be more general in nature referring to what may be the essential characteristics of the crime of aggression. (Possible instruments of reference: Charter of the United Nations; Nürnberg Charter; Draft Code of Crimes against the Peace and Security of Mankind; case law and other documents)

  (ii) Whether the definition should include a more specific list of acts which could constitute the crime of aggression.
  (Possible instrument of reference: General Assembly resolution 3314 (XXIX))

  (iii) Whether it would be possible to identify some acts listed in resolution 3314 (XXIX) and add them to the general definition of the crime of aggression.

- **Conditions under which the Court shall exercise jurisdiction**

  (i) What role should be played by the Security Council in relation to the jurisdiction of the Court over the crime of aggression?

  (ii) What action, if any, could be taken in the event that the Security Council fails or otherwise declines to determine that an act of aggression has occurred?

  (iii) What are the legal effects on the functions of the Court arising from a determination by the Security Council that an act of aggression was committed by a State?

- **Consistency with the relevant provisions of the Charter of the United Nations**

- **Complementarity and admissibility**

  How would the provisions of the Statute on complementarity (admissibility, challenges to the Court's jurisdiction) be applicable to the crime of aggression?

(This could include issues dealt with in preambular paragraphs 6 and 10, article 1, as well as articles 12 to 19 of the Rome Statute.)

- ***Ne bis in idem***

  Applicability of exceptions to the crime of aggression (Rome Statute, art. 20 (3), only refers to crimes in arts. 6, 7 and 8).

- **General principles of criminal law**

  Consider the relationship between the definition of the crime of aggression and the articles on general principles of criminal law:

  (i) *Nullum crimen sine lege* (art. 22)

  (ii) *Nulla poena sine lege* (art. 23)

  (iii) Non-retroactivity *ratione personae* (art. 24)

  (iv) Individual criminal responsibility (art. 25)

  (v) Exclusion of jurisdiction over persons under eighteen (art. 26)

  (vi) Irrelevance of official capacity (art. 27)

  (vii) Responsibility of commanders and other superiors (art. 28)

  (viii) Non-applicability of statute of limitations (art. 29)

  (ix) Mental element (art. 30)

  (x) Grounds for excluding criminal responsibility (art. 31)

  (xi) Mistake of fact or mistake of law (art. 32)

  (xii) Superior orders and prescription of law (art. 33)

- **Investigation and prosecution**

  Consider the provisions concerning the investigation and prosecution of crimes with respect to the crime of aggression (e.g., initiation of an investigation (art. 53))

- **National security information**

  Consider the provisions concerning the protection of national security information in relation to the crime of aggression (art. 57 (3) (c), art. 72, art. 93 (4) and art. 99 (5))

- **International cooperation and judicial assistance**

  These provisions may require further consideration depending upon the applicability of the principle of complementarity to the crime of aggression.

  The following parts of the Rome Statute do not appear to raise possible issues regarding the definition of the crime of aggression:

  Part 4. Composition and Administration of the Court;

  Part 7. Penalties (The penalties set forth in article 77 are applicable to all crimes referred to in article 5.);

Part 8. Appeal and Revision;

Part 10. Enforcement;

Part 11. Assembly of States Parties;

Part 12. Financing;

Part 13. Final Clauses (The provision on aggression is to be adopted in accordance with articles 121 and 123 pursuant to article 5 of the Rome Statute.).

II. Possible issues relating to the Elements of Crimes

- The elements of the crime of aggression are provided for in resolution F rather than article 9 of the Rome Statute.
- Consider the structure and general provisions of the elements of the other crimes prepared pursuant to article 9 of the Rome Statute to ensure consistency.

III. Possible issues relating to the Rules of Procedure and Evidence

- Review the final text of the Rules of Procedure and Evidence prepared by the Preparatory Commission to determine whether there are provisions that require consideration in relation to the definition of the crime of aggression.

IV. Other possible issues

- What are the legal effects on the ICC of a decision of the International Court of Justice concerning aggression?